

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

NOV 10 1995

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In the Matter of)	
)	
Revision of Rules and Policies for the)	IB Docket No. 95-168
Direct Broadcast Satellite Service)	PP Docket No. 93-253
)	
)	
To: Chief, International Bureau)	

REPLY COMMENTS OF
DIRECT BROADCASTING SATELLITE CORPORATION

Direct Broadcasting Satellite Corporation ("DBSC"), by its attorneys and pursuant to section 1.415(c) of the rules, herewith files its Reply Comments in the above-captioned matter. In its initial comments in this proceeding, DBSC emphasized its opposition to the NPRM's proposal to auction the 51 channels being reclaimed by the Commission from Advanced Communications Corporation ("Advanced"). DBSC noted that the proposal to auction those channels breaches a six-year old commitment on which DBSC and others have relied, is unsupported by the record, is contrary to numerous provisions of section 309(j) of the

Communications Act, and will not achieve the Commission's goal to minimize delay in the authorization and provision of additional DBS service to the public.

I. INTRODUCTION

A review of the initial comments of others in this proceeding reveals that, apart from MCI, there is little support for the Commission's expressed preference to auction the newly-available channels. DBSC, EchoStar Communications Corporation, DirectSat Corporation, Advanced, GE Americom, and Continental Satellite Corporation oppose the auction proposal. PrimeStar Partners, L.P. believes that auctioning the channels at 110° W.L. will not accelerate service to the public. DirecTV reluctantly accepts the auction proposal and _____ Sat does not oppose auctions if they are restricted to domestic service.¹ The bulk of the comments, however, are silent on the desirability of the NPRM's auction proposals. Of course, public policy should not be made merely by polling the constituents, but when a proposal receives unqualified endorsement only from the one party which has advocated it, prudence suggests that the matter be carefully considered.

The NPRM's principal rationale for terminating the Commission's long-standing orbit/spectrum allocation policies is that those policies, now some six years old, are no longer relevant to current circumstances and will not expedite the

¹ The Department of Justice supports auctions in a cursory reference to the subject (p. 20).

provision of DBS services to the public. NPRM, pars. 9-17. More specifically, the NPRM contends that allocating the 28 channels available at 110° W.L. among the six DBS permittees eligible to receive them under the Continental² policy would lead, after an excessive delay, to a situation where no entity would have a sufficient number of channels at 110° W.L. to create a viable DBS system. NPRM, pars. 12-15. According to the Commission, this unacceptable result is inevitable and quite certain, whereas auctioning the channels would quickly resolve uncertainty over their ownership and allow one entity to rapidly move ahead to create a competitive DBS service at 110° W.L. NPRM, par.16.

The problem with this reasoning is that it is wrong on both counts. As the initial comments demonstrate, resort to the Continental allocation formula would readily lead to the resolution of the effective use of the 28 channels at 110° W.L., whereas adopting the proposed auction technique would substantially delay the willingness of any one party to invest the hundreds of millions of dollars necessary to build a DBS system at 110° W.L. The comments also demonstrated that auctioning the Advanced channels would violate in numerous and specific respects the clear statutory requirements set forth in section 309(j) of the Communications Act.

² Continental Satellite Corporation, 4 FCC Rcd 6292(1989), partial recon den. 5 FCC Rcd 7421 (1990). See Also EchoStar Satellite Corporation, 7 FCC Rcd 1765, 1772 (1992).

II. Auctioning The Advanced Channels Will Not Expedite Service To The Public. On the Contrary, It Will Delay Such Service. The Orbit/Spectrum Assignment Principles in Continental Will Lead To Far More Rapid Use of the 28 Channels Available at 110° W.L.

In its initial comments, DBSC contended that the orbit/spectrum reallocation principles set forth in Continental and in EchoStar are legally binding on the Commission. Rather than merely repeating these and its other initial contentions here, DBSC instead will address the Commission's claim that adopting auction techniques would better serve the public interest than continuing to adhere to the prior reallocation principles. The NPRM claims that the auction approach would both expedite and simplify the exploitation of the 110° W.L. channels as compared with the earlier reallocation approach. The fact is, however, that the Commission's auction approach will be litigated vigorously. As is already apparent from the pending litigation involving the Commission's earlier decision to cancel Advanced's claim to the 110° W.L. and 148° W.L. channels³, litigation in the court of appeals will be multi-party and complex. It is unlikely indeed that the court will have disposed of those appeals prior to the 18th of January, 1996, and indeed experience suggests that the Advanced appeals will require six to nine months. Further appeals from any determination in this proceeding to abrogate the

³ Advanced Communications Corporation, FCC 95-428, rel. October 18, 1995, ____ FCC Rcd ____ ("Advanced MO & O"), appeals docketed sub nom. Advanced Communications Corporation v. FCC (D.C. Cir, Case No. 95-1551), Tempo DBS, Inc. v. FCC (D.C. Cir, Case No. 95-1560) and PrimeStar Partners, L.P. v. FCC (D.C. Cir, Case No. 95-1561).

prior rights of DBSC and others to the cancelled channels will similarly require many months to be resolved. In the meanwhile, the pendency of such appeals and the attendant uncertainty is likely to undercut if not altogether destroy the practical value of an early auction. As PrimeStar notes in its initial comments (p. 38) any auction bidders must be on notice that until the pending suits are resolved they proceed at their own risk.⁴ The understandable hesitation of the auction winner to plunge into the expenditure of hundreds of millions of dollars for satellite hardware would, in turn, only enhance the competitive advantages of the early entrants.

On the other hand, as demonstrated in the initial comments of Continental Satellite Corporation (p.5) applying the prior reallocation principles would assure that some 25 of the 30 channels available in the eastern region of the DBS orbit⁵ would be available for use within less than two years. Certainly DBSC would be able to put its share of the Advanced channels to work in that timeframe by making suitable arrangements with other DBS licensees. DirecTV, in its comments (p. 11)

⁴ Indeed, in a letter filing in the court of appeals MCI has asked for expedition precisely because it recognizes that if the court proceedings are not resolved before the auction "the winning bidder will be deterred from spending the hundreds of millions of dollars necessary to construct a new DBS system; and the public interest in prompt initiation of a competing DBS service will be thereby frustrated." Letter of MCI's counsel to Mark A. Langer, clerk U.S. Court of Appeals for the District of Columbia Circuit, November 22, 1995, p. 2.

⁵ Composed of the 27 Advanced channels at 110° W.L., 1 additional channel at 110° W.L and two unassigned channels at 61.5° W.L.

notes that it can foresee effective use of its allocation of Advanced channels by using a dual receiver. Undoubtedly, if the Commission would simply allow the parties some reasonable period of time to negotiate among themselves, specific plans could be agreed upon to permit the rapid and effective implementation of the Advanced channels. Numerous such plans have already been proposed, including one of EchoStar, DBSC's plan, and that of Continental. If, on the other hand, and contrary to DBSC's expectations, such plans could not be agreed upon, relatively little time would have been lost in the process and the Commission will be in a better position to defend its reasoning before the court of appeals.

III. DBSC AND OTHERS RELIED ON THE COMMISSION'S PRIOR COMMITMENT TO REASSIGN VACATED DBS CHANNELS TO DBS PERMITTEES AND SIZED THEIR SPACECRAFT TO ACCOMMODATE SUCH ADDITIONAL CHANNELS

DBSC, like other DBS permittees, relied on the Commission's commitment to reallocate vacated channels in sizing its two DBS spacecraft. Even after being assigned only 11 channels at each of its two orbital positions, DBSC nevertheless continued with the procurement of two 16 transponder spacecraft because it anticipated that it would be able to use the additional capacity.⁶ Understandably, larger spacecraft are more expensive to build and launch than smaller, lighter

⁶ As noted in its initial comments DBSC's May 1995 contract amendment called for two 32 transponder spacecraft with the capability to double the power by using only 16 transponders.

satellites. Other DBS permittees apparently made similar decisions, as reflected in the procurement activities of EchoStar, DirectSat and Continental. It is arbitrary and capricious for the Commission to suddenly withdraw its commitment after members of the industry have relied in good faith on the Commission's commitment to reassign additional channels to them if such channels subsequently became available.

IV. THE COMMISSION LACKS STATUTORY AUTHORITY TO USE AUCTIONS FOR THE CANCELLED DBS CHANNELS

The initial comments demonstrate that the Commission lacks statutory authority to use an auction in the present circumstances. The Commission's auction authority is to be found in section 309(j) of the Communications Act, 47 U.S.C. section 309(j). The proposal to use auctions in the present circumstances would violate numerous explicit requirements of that statute. Principal among these is the requirement that the licenses to be issued in any auction must be "initial" (section 309(j)(1)). As DBSC demonstrated in its initial comments, the license to be issued here, however, would not be an initial license. Similarly, the Commission can use auction techniques only if doing so would expedite the initiation of service (section 309(j)(3)(A)) but as demonstrated above, that conclusion is impossible to justify on the present record. Section 309(j)(3) of the statute also permits the use of auctions to promote the development and rapid deployment of new technologies without administrative or judicial delays, to

promote economic opportunity by disseminating licenses among a wide variety of applicants including small businesses, and for the efficient and intensive use of the spectrum. None of these purposes would be served by the NPRM's proposed auction of Advanced's cancelled channels. Indeed, as shown in DBSC's initial comments and those of Advanced, the likely results would be opposite to those contemplated by the statute. Section 309(j)(6)(E) specifies that the provisions of section 309(j) cannot be construed to relieve the Commission of the obligation to continue to use, inter alia, negotiation to avoid mutual exclusivity in application and licensing procedures. In its initial comments and again in these reply comments DBSC has demonstrated that the Commission has ignored numerous suggestions for a negotiated solution to the reallocation of the Advanced channels.

The auction statute also specifically forbids the Commission to find that the inflow of auction proceeds to the Federal Treasury is a justifiable basis on which to conduct auctions. See section 309(j)(7)(A) and (B). While the NPRM is careful not to step into the trap of contravening these provisions explicitly, it is difficult to ignore the reality that in a period of budgetary difficulties the Commission is attracted to the prospect of adding hundreds of millions of dollars to the government's coffers.

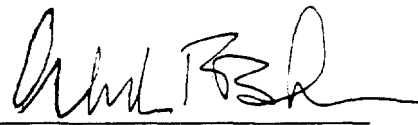
V. CONCLUSION

The NPRM's proposal to use auctions to award the cancelled Advanced channels is arbitrary and capricious in denying DBSC and others their vested rights

to a portion of the cancelled channels -- rights on which they have relied in sizing and constructing spacecraft. It is based on an inadequate record and erroneous factual assumptions. It is inconsistent with and cannot be sustained under section 309(j) of the Communications Act. The Commission should reaffirm the reallocation rights of DBSC and others and abandon its proposed reliance on auctions.

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November 30, 1995

CERTIFICATE OF SERVICE

I, Maria Coll, a secretary in the law firm of Sullivan & Worcester, hereby certify that on this 30th day of November, 1995, a copy of the foregoing "Reply Comments" was sent by first class U.S. Mail, postage prepaid, to the following:

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